91-413

Supreme Court, U.S.
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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BRUCE BOWERS,

Petitioner,

v,

U.S. DEPARTMENT OF JUSTICE

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Counsel for Petitioner

August 9, 1991

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Fourth Circuit accorded a degree of deference to the Government's affidavits that is inconsistent with de novo review under the Freedom of Information Act ("FOIA") and with the holding of the United States Court of Appeals for the District of Columbia in Ray v. Turner.

2. Whether the Fourth Circuit improperly accorded "substantial weight" to Government declarations regarding issues not involving national security concerns.

3. Whether the presumptions in Executive Order 12356 that disclosure of certain kinds of information is "presumed" to cause damage to national security violate the de novo review provision of the FOIA; alternatively, whether the findings made by the district court were sufficient to rebut such presumptions.

4. Whether in light of its finding that the district court had acted as a "layman," the Fourth Circuit should have remanded the case for further proceedings in accordance with the legal requirements of the FOIA.

5. Whether a discretionary award of costs should be made pursuant to Rule 39, Federal Rules of Appellate Procedure, against a FOIA plaintiff who prevailed pro se in district court and is without funds to pay the costs of the appeal taken by the Government.

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OPINIONS BELOW

The District Court issued an opinion styled "Order" on March 7, 1990. This opinion is set forth in the Appendix at A-37/43.

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 930 F.2d 350 (4th Cir. 1991), and is set forth in the Appendix at A-46/81. Amendments to this opinion were issued on June 3, 1991 and are found in the appendix at A-85.

On May 2, 1991, the Clerk of the Fourth Circuit approved a bill of costs in the amount of $1,C31.80. See Appendix at A-82. By Order dated May 3, 1991, the Clerk of the Fourth Circuit, by direction of the Court, issued an order reaffirmed the award of cots. See Appendix at A-84.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was entered on April 11, 1991. By Order dated July 2, 1991, Chief Justice William H. Rehnquist extended the time within which to file a petition for certiorari to and including August 9, 1991.

This Court has jurisdiction to review this case pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Freedom of Information Act, 5 U.S.C. § 552, provides in pertinent part:

(b) this section does not apply to matters that are--

(1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign pol-

icy and (B) are in fact properly classified pursuant to such Executive Order;

(2) related solely to the internal personnel rules and practices of the agency;

. . . . .

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . ., (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reason-

ably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. . . .

Executive Order 12356 provides in pertinent part:

Section 1.3. Classification Categories

* * *

(c) Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods is presumed to cause damage to the national security.

STATEMENT OF THE CASE

This suit arises out of several Freedom of Information Act ("FOIA") requests submitted in 1984 and 1985 by a journalist, Bruce Bowers ("Bowers"), who was seeking information for possible use in news broadcasts and a book. The three files sought concerned Valentin Kamenev ("Kamenev"), a Soviet diplomat who had recently served at the Russian Embassy in Washington, D.C.; Jacob (or "Feckabs") Znatnajs ("Znatnajs"), a Latvian national who had entered the U.S. illegally in 1946; and Ingrid Vanda Noreiko ("Noreiko").

In July 1986, Bowers, filed his FOIA suit pro se. After preliminary skirmishing, the district court ordered the Government to submit all documents at issue for in camera inspection. Ultimately, the Government complied.

On March 7, 1990, the District Court issued his order. He stated that he had reviewed all three files twice. He noted that it had taken a long time--"three weeks or more"--and that the files he reviewed included many thousands of pages. [Appendix at 38 ("A-38")]

Although he did not think that the Kamenev file contained "any state secrets nor any information crucial to national security," he declined to order its release because "it is possible (theoretically) that, to one more technically expert than I, the file might conceivably reveal a morsel or two of out-of-date information on technology." [A-39]

With respect to the files on Noreiko and Znatnajs, he found that "they do not appear to contain anything remotely resembling anything connected with national security

or other legitimate claim to exemption from the Freedom of Information Act." [A-40] In support of this finding, he noted that Noreiko had been in the U.S. for many years, that she "had been apparently successfully employed in conventional occupations for most of that time, including recent times." However, she had "held no position of trust or confidence in any government"; that she "is not shown to have been in a position to handle or observe any confidential information"; and that "the file shows nothing to indicate that she has ever been involved in matters involving national security nor [had] any personal contacts with other people involved in national security matters . . . ." Id. [A-40/41]

With regard to Znatnajs, he found that "the file appears to be a complete blank as to anything remotely connected with na-

tional security or any other security interests of the United States." Id. [A-41] He noted that Znatnajs "is (or was) a person of low income and limited connections who came to this country many decades ago and, during the times addressed in the file, was living on a low economic level in New York City." Finally, he stated that the only thing "'suspicious'" about Znatnajs was a report that a U.S. agent "had been told by an unidentified man in a bar" that the Znatnajs had bought drinks for uniformed American sailors and soldiers and had asked them "about their war experiences." Id. [A-42]

In view of these facts, the district court ordered the release of the Znatnajs and Noreiko files.

The Court of Appeals reversed. Painting with equally as broad a brush as had

the district court, if not broader, it affirmed all of the Government's exemption claims without discussing any of them in detail, primarily resting its decision on the ground that it believed that the district court had failed to give the Government's declarations "substantial weight." In reversing the district court, the Court of Appeals repeatedly sounded the theme of deference to the declarations of Government affiants. Thus, it asserted that "[w]hat fact or bit of information may compromise national security is best left to the intelligence experts." Bowers v. U.S. Dept. of Justice, 930 F.2d 350, 357 (4th Cir. 1991)(emphasis added). And that "'[t]he court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency.'" Id., quoting Spannaus v.

Department of Justice, 813 F.2d 1285, 1289 (1987), quoting Barney v. Commissioner, 618 F.2d 1268, 1272 (8th Cir.1980).

REASONS FOR GRANTING THE WRIT

POINT I

THE DECISION OF THE COURT OF APPEALS RESTS ON A DEGREE OF DEFERENCE TO AGENCY AFFIDAVITS THAT IS INCONSISTENT WITH DE NOVO REVIEW AND THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA IN RAY V. TURNER

In EPA v. Mink, 410 U.S. 73, 81-84 (1973), this Court held that a reviewing court could uphold claims of immunity under Exemption 1, 5 U.S.C. § 552(b)(1), solely on the basis of an agency affidavit stating that the requested documents had been duly classified pursuant to Executive order. In 1974 Congress amended Exemption 1 to override the Mink decision. In so doing, it firmly established that courts

must review national security claims de novo. The issue of the degree of deference which a court may accord to an agency's declarations justifying its decision to classify information is fundamental to Congressional intent to assure independent review of agency classification determinations. Thus, the importance of this issue warrants this Court's review of the Fourth Circuit's decision in this case.

The Fourth Circuit's decision in this case applies a highly deferential standard of review of national security claims. Indeed, the standard of review is so deferential to agency declarations supporting such claims that it virtually gives such declarations not merely "substantial weight," but conclusive weight. The high degree of deference is indicated by the Fourth Circuit's assertions that "[w]hat

fact or bit of information may compromise national security is best left to the intelligence experts." Bowers, supra, 930 F.2d at 350 (emphasis added). And: "'The court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency.'" Id. (emphasis added), quoting Spannaus, supra, 813 F.2d at 1289), quoting Barney, supra, 618 F.2d at 1272.

The United States Court of Appeals for the District of Columbia initially agreed with this position, holding that "[i]n deciding whether to conduct an in camera inspection [the court] need not go further to test the expertise of the agency or to question its veracity when nothing appears to raise the issue of good faith." Weissman v. Central Intelligence Agency, 565 F.2d 692, 697 (D.C.Cir. 1077). Subse-

quently, the D.C. Circuit reversed itself on this point, holding that "in camera inspection does not depend on a finding or even a tentative finding of bad faith." Ray v. Turner, 587 F.2d 1187, 1195 (D.C. Cir. 1978). Chief Judge Skelly Wright elaborated on this in his concurring opinion in Ray, noting that de novo review was intended to "'prevent [the courts' review] from becoming a meaningless judicial sanctioning of agency discretion.'" Id. at 1210 (Wright, C.J., concurring in the result).

As Judge Wright noted in his concurrence in Ray, "Congress feared more than 'bad faith' in the exercise of agency discretion to withhold government information. Even 'good faith' interpretations by an agency are likely to suffer from the bias of the agency, particularly when the

agency [has been] zealous . . . in its responsibility to protect 'national security.'" Id. Thus, "Being aware of the dangers of relying too much on agency 'expertise,' Congress required the courts to take a fresh look at decisions against disclosure as a check against both intentional misrepresentations and inherent biases." Id. (Wright, C.J., concurring in the remand). The Fourth Circuit's decision in this case places such a high degree of deference on agency security classification decisions--even entirely disregarding the factual findings of a district court that it would normally defer to--that it threatens a return to the Mink standard which Congress expressly overturned. At the very least, the Fourth Circuit's standard establishes a formidable presumption in favor of an agency's

classification determinations. One authority who has examined in depth the intent of Congress regarding the review of executive branch security classifications under the FOIA has asserted that the "substantial weight" comment made by the Conference Committee which considered the 1974 amendments "should in no way be taken to suggest the imposition of a presumption favoring the agency." Howard Roffman, "Freedom of Information: Judicial Review of Executive Security Classifications," XXVIII University of Florida Law Review 551, 558-559 (Winter 1976). He further notes that "President Ford vetoed the Act because he felt the conferee language failed to create such a presumption; Congress, in its initial consideration of the 1974 amendments, specifically rejected a similar presumption contained in the Sen-

ate draft of the bill." Id.

Because of the importance of the issue the conflict with decisions such as Ray v. Turner in the D.C. Circuit, and the legislative history concerning this issue, this Court should grant certiorari.

POINT II

THE FOURTH CIRCUIT'S RULING ACCORDING "SUBSTANTIAL WEIGHT TO AGENCY DECLARATIONS REGARDING NON-NATIONAL SECURITY EXEMPTION CLAIMS IS IN CONFLICT WITH DECISIONS IN THE DISTRICT OF COLUMBIA CIRCUIT SUCH AS GOLAND V. CENTRAL INTELLIGENCE AGENCY

The Fourth Circuit accorded "substantial weight" to all of the agency's justifications, regardless of whether they dealt with national security claims or other exemptions. This is in conflict with Goland v. Central Intelligence Agency, 607 F.2d 339, 352 (D.C.Cir.1979)("Congress has instructed the courts to accord 'substantial

weight' to agency affidavits in national security cases")(emphasis added), and Ray v. Turner, supra, 587 F.2d at 1294. While the legislative history of the 1974 amendments indicates that "substantial weight" may be accorded to agency affidavits in the national security context, according such weight to agency declarations concerning other exemptions claims totally undermines the kind of de novo review Congress intended such claims to receive.

POINT III

THE PRESUMPTIONS IN SECTION 1.3(c) EXECUTIVE ORDER 12356 CONTRAVENE THE DE NOVO REVIEW PROVISION OF THE FOIA; ALTERNATIVELY, THEY ARE REBUTTABLE.

In deciding give an extremely high degree of deference to the Government declarations filed in this case, the Fourth Circuit repeatedly praises the skill and

expertise of its declarants. However, with respect to much of the material withheld, the declarants relied not on their independent evaluation of the impact which disclosure would have on national security but upon presumptions contained in Executive Order 12356. These presumptions are based on Section 1.3(c) of the Executive Order and provide that: "Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods are presumed to cause damage to the national security."

The Fourth Circuit endorsed withholding based on these presumptions. But these presumptions in E.O. 12356 violate the FOIA's de novo review provision. Congress emphatically rejected attempts to create presumptions in favor of classification.

The original Senate version of the bill to amend Exemption 1 stipulated that if an agency head submitted to the court an affidavit stating that, on the basis of his personal examination, a contested document was properly withheld under the appropriate executive order, "the court shall sustain such withholding unless . . . it find the withholding is without a reasonable basis. . . ." S. 2453, § (a)(4)(B), reprinted in 120 Cong. Rec. 9311 (daily ed. May 30, 1974). Senator Muskie argued that this provision created an "overwhelming" presumption of the validity of classification and would defeat the objective of independent judicial review by "shift[ing] the burden of proof away from the Government." Id., at 9319. Since the purpose of the amendment was to force the government to persuade the court that its withholding was

justified, Senator Muskie insisted that: "We ought not to classify information by presumptions but only on the basis of merit." Id., at 9321.

Alternatively, the presumptions contained in Section 1.3(c) are rebuttable rather than conclusive. Powell v. United States Dep't of Justice, 484 F. Supp. 1508, 1516-1517 (N.D.Cal.1984), noted King, 830 F.2d at 215 n.44. In laying down its almost insuperable standard of deference to the Government's affidavits, the Fourth Circuit neglected to consider whether the district court's findings--which it entirely disregarded, notwithing the provisions of Rule 52, F.R.C.--in effect rebutted the presumptions contained in the Executive order, thus providing the countervailing evidence which plaintiff could not provide cause the Government's critical submissions

were presented in camera. Instead, the Fourth Circuit took the district court to task for his finddings that the nature of the activities of the subjects of Bowers' requests did not seem plausibly related to valid national security concerns, asserting that Exemption 1 "does not require, as a legal prerequisite for withholding, that the subject of the plaintiff's request be 'in a position to handle or observe confidential information.'" 930 F.2d at 350.

This attempt to dismiss the adequacy of the district court's findings misses the point. The district court's findings, made after a lengthy in camera review of the actual records, addressed the issue of whether or not the Government's Exemption 1 claims were plausible. With respect to one investigation, the court found that the subject had "held no position of trust or

confidence in any government"; that she "is not shown to have been in a position to handle or observe any confidential information"; and that "the file shows nothing to indicate that she has ever been involved in matters involving national security nor [had] any personal contacts with other people involved in national security matters . . . ." The test under both Exemption 1 and E.O. 12356 is whether unauthorized disclosure of the information "reasonably could be expected to cause damage to the national security." E.O. 12356, § 1.1(a)(3). The district court's findings were obviously relevant to the central inquiry regarding Exemption 1 claims: viz., whether disclosure of the withheld information reasonably could be expected to cause damage to national security. The findings, which the Fourth

Circuit failed to discuss in relation to their relevancy to the plausibility of a reasonable likelihood of damage to national security, rebutted the presumptions contained in Executive Order 12356.

POINT IV

THE FOURTH CIRCUIT SHOULD HAVE REMANDED THE CASE FOR FURTHER PROCEEDINGS RATHER THAN REVERSED IT OUTRIGHT

The Fourth Circuit faulted the district court for having reviewed the unredacted copies of the material he inspected in camera "through the eyes of a layman," 630 F.2d at 355, and not having discussed each particular exemption claim. But just as the district court failed to jump through some legal hoops, so did the Court of Appeals, seeking to dispose of all exemption claims on the single ground of deference to agency affidavits.

Given its finding that the plaintiff had drawn a judge who acted as a layman, the appropriate course was to remand the case for further proceedings in accordance with the legal requirements of the FOIA. A litigant, especially a pro se litigant, is entitled to more from the federal judiciary than a decision by a judge acting as a layman.

POINT V

GIVEN THE PURPOSE OF THE FREEDOM OF INFORMATION TO MAXIMIZE THE DISSEMINATION OF INFORMATION AND THE INABILITY OF APPELLEE TO PAY COSTS, THE FOURTH CIRCUIT'S AWARD OF $1,031.80 IN COSTS TO THE GOVERNMENT WAS IMPROPER

After reversing the judgment of the district court in Bowers' favor, the Fourth Circuit assessed him $1,031.80 in costs. Under Rule 39(a), Federal Rules of Civil Procedure, there is a presumption that costs may be awarded to the prevailing party unless the court directs otherwise.

Baez v. United States Dept. of Jus-tice, 684 F.2d 999 (D.C.Cir. 1982)(en banc). However, in appropriate cases, the court may in its discretion deny such an award of costs. Baez; Owen v. Patton, 925 F.2d 1111 (8th Cir. 1991)(denying costs to prevailing party in light of possible perjury by successful party's witness and improper conduct by his counsel).

The circumstances of this case warranted the use of the Court's discretion to deny costs. First, Bowers, representing himself pro se, won the case in the district court. Requiring a FOIA plaintiff to pay the Government's appeal costs in these circumstances imposes a heavy burden which would have a chilling effect on the exercise by citizens of their right to seek information under the FOIA. Particularly where, as here, the FOIA plaintiff is a

journalist, this in turn would undercut the FOIA's objective of maximizing the dissemination of information to the public.

In amending the FOIA in 1974 to make it effective, Congress added provisions which sought to minimize the economic disincentives to journalists and others to pursue their rights under the FOIA. These included a provision for waiver of search fees and copying costs, 5 U.S.C. § 552(a)(4)(A), and a provision for attorney's fees, 5 U.S.C. § 552(a)(4)(E). The fee waiver provision was amended in 1986 to enhance the prospects of fee waivers for the information-disseminators.

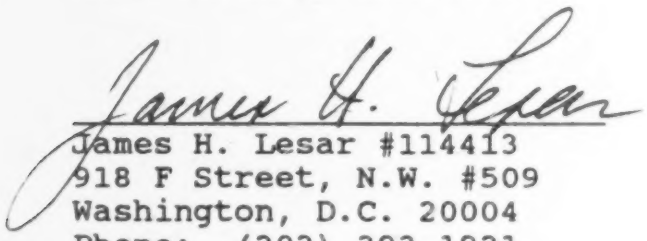
Awarding costs to the Government in the circumstances of this case undercuts the clear intent of Congress to remove obstacles to litigation by FOIA requesters, par-

ticularly when the FOIA litigant has advised the court that he is unable to pay the large costs incurred. Therefore, the Fourth Circuit should have used its discretion to deny costs to the Government in this instance.

CONCLUSION

For the reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,



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APPENDIX

FILED

Charlotte, N.C.

Oct 2, 1986

U.S. District Court

W. Dist. of N.C.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

C-C-86-336-M

BRUCE BOWERS,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	O R D E R
	)	
UNITED STATES DEPARTMENT OF	)	
	)	
JUSTICE,	)	
	)	
Defendant.	)	

On July 18, 1986, plaintiff filed suit against the United States Department of Justice under the Freedom of Information

Act, 5 U.S.C. §§552 et seq. Plaintiff in his complaint alleges that he requested certain information from the Federal Bureau of Investigations (FBI) and that the FBI denied him access to the requested information. The plaintiff attached to his complaint the FBI's letters denying access to the records. The FBI in conclusory terms stated that the information plaintiff sought was exempt under various provisions of the Freedom of Information Act.

On September 12, 1986, the defendant filed an answer to the complaint. The answer refers to the FBI's letters denying access to the records and "respectfully refers the court" to the letters "for the true and correct meaning of its contents." The answer does not provide any further explanation of why the defendant considers the records in question exempt from dis-

closure under the Freedom of Information Act.

On September 16, 1986, plaintiff filed a renewed motion to compel defendant to prepare a Vaughn index with respect to each agency record or portion of an agency record which the FBI claims is exempt from the disclosure requirements of the Freedom of Information Act.

After considering the pertinent statute, and the pertinent decisions, including J. P. Stevens & Co. v. Equal Employment Opportunity Commission, 710 F.2d 236 (4th Cir. 1983); Founding Church of Scientology v. Bell, 603 F.2d 945 (D.C.Cir. 1979); Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), the court is of the opinion that the motion should be allowed.

IT IS THEREFORE ORDERED:

1. That plaintiff's motion to compel defendant to prepare a Vaughn index is GRANTED.

2. That defendant shall, on or before the 31st day of October, 1986, file a Vaughn index containing an itemized and indexed inventory of every document or portion of a document responsive to plaintiff's Freedom of Information Act requests. The index shall cross-reference each withheld document or deletion from a released document, divided into manageable subsections, with the exemption claimed as a justification for non-disclosure.

The index shall contain a detailed description of each withheld document or deletion from a released document, divided into manageable subsections. This description shall include: (1) the number of pages in the document; (2) the type of

document [letter, memorandum, etc.]; (3) the subject matter of the document; (4) the titles or headings of the document and any subdivisions; and (5) a detailed description of the contents of each withheld document or deletion from a released document.

The index shall contain a detailed and specific justification statement for the exemption or exemptions claimed for each withheld document or deletion from a released document. The justification statement shall specify in detail why the government believes the withheld documents or deletions from a released document are exempt, with specific factual and evidentiary support for each element of a claimed exemption. The justification statement shall be cross-referenced to the detailed description of the withheld material.

The Vaughn index should be contained in one document, complete in itself. The index shall be sworn to by the defendant employee who is most knowledgeable about the preparation of the index and its contents.

This 1 day of October, 1986.

/s/ James B. McMillan
James B. McMillan
United States District Judge

FILED
Charlotte, N.C.
Oct 15, 1987
U.S. District Court
W. Dist. of N.C.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division

C-C-86-336-M

A-6

BRUCE BOWERS,

Plaintiff,

-vs-

UNITED STATES DEPARTMENT OF JUSTICE,

Defendant.

ORDER

On December 5, 1986, defendant filed a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff filed a response to defendant's motion on December 17, 1986.

The defendant's motion was heard on September 4, 1987. Having considered the pleadings and record in the action, the court concludes that there are factual issues in dispute and that the defendant is not entitled to a judgment as a matter of law.

IT IS THEREFORE ORDERED that defendant's motion for summary judgment is

DENIED.

This 14 day of October, 1987.

/s/ James B. McMillan
James B. McMillan

United States District Judge

FILED

Charlotte, N.C.

Oct 15, 1987

U.S. District Court

W. Dist. of N.C.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

C-C-86-336-M

BRUCE BOWERS,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	
	)	O R D E R
	)	
UNITED STATES DEPARTMENT OF	)	
	)	

JUSTICE,)
)
Defendant.)

On September 4, 1987, the court heard arguments on plaintiff's motion to hold defendant in contempt of prior court orders in this suit. Defendant agreed to produce all materials sought by plaintiff for in camera inspection by the court, but stated in a letter to the court the additional condition that the judge's law clerks must receive security clearance before they could assist in the in camera review.

Defendant cites Department of Justice Order No. 2620.6 (June 8, 1978) as legal authority to support the imposition of the security clearance requirement. This "Order" is a creation of the defendant, a litigant in this case. No other authority

is cited by defendant for its extraordinary demand.

The condition set out in the defendant's letter is unsupported by controlling citation and is unacceptable to the court. federal judge should not consent to any restriction of the court's jurisdiction by act of any agent of the executive branch.

IT IS THEREFORE ORDERED THAT:

1. Defendant will, by October 30, 1987, without qualification or reservation, submit to the court for in camera inspection, unredacted copies of all the records in this case covered by plaintiff's requests under the Freedom of Information Act, 5 U.S.C.A. Section 552.

2. In addition to the above records, defendant will submit to the court for in camera review, justifications claimed for defendant's withholding from the plaintiff

the material contained in the records. The justifications will be sufficiently detailed to permit the court to correlate the justifications with the material withheld.

/s/ James B. McMillan
James B. McMillan

United States District Judge

FILED

Charlotte, N.C.

December 17, 1987

U.S. District Court

W. Dist. of N.C.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

C-C-86-336-M

BRUCE BOWERS,	)	
	)	
Plaintiff,	)	
	)	
-vs-	)	O R D E R
	)	
UNITED STATES DEPARTMENT OF	)	
	)	
JUSTICE,	)	
	)	
Defendant.	)	

Defendant's motion for reconsideration of the order of October 15, 1987, is DENIED.

Defendant will produce, by January 2, 1988, the information called for by the October 15 order.

IT IS SO ORDERED, this 17 day of December, 1987.

/s/ James B. McMillan
James B. McMillan

United States District Judge

FILED

Charlotte, N.C.

January 20, 1988

U.S. District Court

W. Dist. of N.C.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE

WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

C-C-86-336-M

BRUCE BOWERS,	)	
	)	
Plaintiff,	)	
	)	
-vs	)	MEMORANDUM
	)	
UNITED STATES DEPARTMENT OF	)	
	)	
JUSTICE,	)	
	)	
Defendant.	)	

The court has transmitted by U.S. mail today its "Reconsideration of the District

Court Order of December 17, 1987 (in the case of Bruce Bowers, plaintiff, vs. United States Department of Justice, defendant, Docket No. C-C-86-336-M, WDNC) as directed by the United States Court of Appeals for the Fourth Circuit for filing in Mandamus proceeding No. 87-1205 in that court. A copy of the "Reconsideration" is attached to this memorandum.

This the 14th day of January, 1988.

/s/ James B. McMillan
James B. McMillan

United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-1205

RECONSIDERATION OF THE DISTRICT COURT ORDER O
DECEMBER 17, 1987 (IN THE CASE OF BRUCE BOWER
PLAINTIFF, VS. UNITED STATES DEPARTMENT OF

JUSTICE, DEFENDANT, DOCKET NO. C-C-86-336-M WDNC), AS DIRECTED BY THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Bruce Bowers, plaintiff, filed suit number C-C-86-336-M in the United States District Court for the Western District of Northern Carolina on July 18, 1986, seeking information under the Freedom of Information Act, 5 U.S.C. § 552, concerning three individuals who had migrated to the United States. Plaintiff, pro se, attempted various discovery proceedings.

On October 15, 1987, pursuant to a full hearing on oral and written arguments, this court entered an order requiring defendants to submit to the court for in camera inspection the materials sought by plaintiff. (Copy attached.)

No appeal was noted or taken.

On October 27, 1987, defendant moved for revision of this court's order so that it would require the district judge's law clerks to pass a security clearance check before having access to the information. That request was denied by order of December 17, 1987. (Copy attached.)

All of the above proceedings were in in the style of an action pending in this court and captioned as follows:

"IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA

Charlotte Division

C-C-86-336-M

BRUCE BOWERS,)
)
Plaintiff,)
)
-vs-)
)
UNITED STATES DEPARTMENT OF)
)
JUSTICE,)

Defendant.)"

****

On January 4, 1998, this court received an order dated December 30, 1987, from the United States Court of Appeal for the Fourth Circuit. That order, like this one, was captioned "In Re United States Department of Justice, Petitioner." Bruce Bowers is not mentioned in that order nor in its caption. The order, in pertinent part, reads:

> ". . . . the Department of Justice's motion for a stay of the orders of the district court requiring production of certain classified documents on January 2, 1988, is granted. During the pendency of the stay, the Court directs that the district court reconsider its refusal to obtain security clearance for its staff members in light of the discussion contained herein. The stay will remain in effect until further order of this Court.
>
> "It is further ORDERED that a disposition of the Department of Justice's petition for a writ of

> mandamus is deferred until the district court has had an opportunity to conduct the reconsideration ordered today."

The papers received by this court do not indicate that Bruce Bowers has been heard by the Circuit Court on this question, nor that any argument by him has been requested, nor that a copy of the December 30 order was sent to him by the Clerk of the Circuit Court. I assume, although the record does not support the assumption, that Bowers does by now have some knowledge about what is going on, because he has made inquiries at the office of the Clerk of the Court.

In the "best of all possible worlds" dreamed of by Voltaire in Candide, the plaintiff would have his own counsel; and a trial judge in this court's position would, like the Justice Department, be represented by trained lawyers, so that

when a proceeding is converted via mandamus into a proceeding that might well be captioned, "The Circuit Court versus the District Judge," the trial judge would not have to lay aside other duties and act as his own lawyer. There is considerable discomfort in being put in a position of ignoring the Circuit Court's order or creating the appearance of seeming to represent one of the litigants. However, since this court must obey the instructions of the Circuit Court and reconsider the previous decision, I make the following submission:

The issue is whether the Attorney General, acting pursuant to Presidential Executive Order, possesses the power under our constitutional system to make rules binding on United States courts. The resolution of this issue does not turn on

whether the government has a legitimate or a "compelling" interest in secrecy, or whether the President has the power to adopt procedures governing access to classified information by persons outside the executive branch. Likewise, the wisdom of the demand that law clerks receive security clearance before doing their court job of assisting their trial judge in an in camera review of classified materials is not an issue.

The principle on which this court's ruling rests is that Congress alone has the power to prescribe procedures for the federal courts. [Congress may, of course, delegate this regulatory power to the Chief Justice of the Supreme Court, and has done so in several instances, such as the Rules Enabling Act of 1934, 28 U.S.C. §2072, and the Classified Information Pro-

cedures Act of 1980, 18 U.S.C.App. § 9.]

The executive branch of government has no power to impose a rule of civil trial procedure on federal courts, regardless of whether such a rule serves an important goal, or whether Congress has seen fit in another context to impose a requirement identical to that which the executive now seeks to impose.

Congress has authorized the Chief Justice, not the Attorney General, to promulgate rules governing trial court procedure in civil cases. 28 U.S.C. § 2072 provides in pertinent part, as follows:

> "§ 2072. Rules of civil procedure
>
> The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, includ-

ing admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review of enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution."

****

Neither Congress nor the Chief Justice has required security clearances for law clerks assisting judges who conduct in camera inspection of documents in civil suits under the Freedom of Information Act.

The Classified Information Procedures Act applies by its express terms to criminal cases only. In enacting the Classi-

fied Information Procedures Act, Congress directed the Chief Justice to promulgate rules governing the manner in which courts handle classified information in criminal proceedings. 18 U.S.C.App. § 9. The rules require that all court personnel other than judges receive security clearance in criminal cases before they have access to classified information. The express provisions of the Chief Justice's rules make it abundantly clear that the security clearance requirement is limited to criminal proceedings. This is not a criminal case; CIPA does not apply.

Congress has not required security clearance for an in camera inspection in a FOIA case. So to hold would be to ignore the plain language of CIPA, and to distort the concept of legislative intent. The passage of CIPA in 1980 and the continued

silence of FOIA as to any security clearance support the view that Congress intended not to require security clearance in FOIA cases.

Prior Fourth Circuit decisions do not appear to address this issue of constitutional power, nor the requirement that a judge's law clerks have security clearance to participate in in camera inspections of classified documents in a FOIA case.

This court is not acting in derogation of precedent or statute when it refuses to submit to a condition imposes by executive branch action on the exercise of its FOIA jurisdiction. There is no "clear error" here that justifies mandamus.

The stay should be vacated and the petition denied.

To find that the national security power of the executive includes the power to

regulate the procedures of the federal courts is to undermine the independence of the judicial branch and to violate the constitutional doctrine of separation of powers. There is no justification in the Constitution or our history for such an unwarrranted expansion of executive power. Courts have no legitimate authority to make statutes say what they may think Congress should have said.

SUMMARY

1. The plaintiff has a personal stake in this case; this court does not. If the plaintiff should chance to benefit or to suffer from this response, it should be remembered that the response was not voluntary but was ordered by a higher court.

2. The United States Constitution does not authorize the United States Attorney

General, under the aegis of national security or otherwise, to override or disobey a decision of a United States Court--Supreme, Circuit or District--on any matter within the jurisdiction of that court.

3. The Attorney General is the defendant in this case; he is not mentioned in the Constitution; he is appointed by the President; when he does the bidding of the President, he exercises the executive power of the United States.

4. Nothing in the Constitution exempts the Attorney General from the obligation to follow the Constitution and acts of Congress lawfully enacted in compliance with the Constitution.

5. The security clearance sought by the Attorney General is not a creation of Congress. No pertinent act of Congress has been cited to support the position as-

serted by the Department of Justice. The section cited in the Circuit Court's order, 18 U.S.C. § 9, does not deal with security clearances. It deals rather with the definition of the term "vessel of the United States." The Classified Information Procedures Act of 1980, 18 U.S.C. App. § 9, does authorize the Chief Justice to make rules in criminal cases, requiring security clearance for any person "appointed by the court." Those Classified Information Procedures Act rules, by their own clear terms, and in light of an equally clear legislative history, apply exclusively to criminal cases; moreover, that Act gives rule-making authority to the Chief Justice - not the Attorney General. This is a civil case. I am not willing to make the easy assumption that Congress meant "civil and criminal" when they re-

peatedly used the word "criminal."

6. The government's petition for writ of mandamus, served by mail on December 23, 1987, has an enclosure which says that the "Bureau [FBI] does not in any sense impugn the integrity of Judge McMillan's law clerks..." Nowhere do I find in the papers filed by the government any suggestion that this court's law clerks are disloyal to the United States.

7. The government has not challenged the patriotism of my law clerks, nor do I.

8. After careful reconsideration, this court's orders of October 15, 1987 and December 17, 1987, are re-affirmed.

This 14 day of January, 1988.

/s/ James B. McMillan
James B. McMillan
United States District Judge

FILED

April 7, 1988

U.S. Court of Appeals

Fourth Circuit

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 87-1205

In Re United States Department of Justice,

Petitioner

ORDER

Before the Court for renewed consideration is a petition by the United States Department of Justice for a writ of mandamus pursuant to 28 U.S.C. 1651 and Fed. R. App. P. 21. Petitioner initially sought

the writ to compel District Judge James McMillan to delay an in camera inspection of certain classified documents sought by a plaintiff in a civil action brought pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. 552 until all members of Judge McMillan's staff who would have access for the classified material obtained appropriate security clearances. Judge McMillan had originally declined the Department of Justice's request for security clearances concluding that it was an "extraordinary demand" constituting an unacceptable effort to restrict the court's jurisdiction.

In an order issued on December 30, 1987, this Court withheld issuance of the writ but directed Judge McMillan to reconsider his refusal to order security clearances in light of the significant national

interest in preserving legitimate confidentiality. We specifically directed the district judge's attention to the well-established dedication to national security embodied in this Court's opinion in Alfred A. Knopf, Inc. V. Colby, 509 F. 2d 1362 (4th Cir. 1975), as well as in the regulations adopted by the Chief Justice of the United States pursuant to 18 U.S.C. App. 9.

On January 14, 1988, Judge McMillan issued an opinion announcing that after conducting the reconsideration ordered by this Court, he adhered to his view that he was not required to obtain security clearance for his staff before proceeding with the FOIA case. This Court then directed that Judge McMillan file a formal response to the petition for mandamus pursuant to Fed. R. App. P. 21. That response has now

been filed and the matter is ripe for fi-final disposition.

It is evident from his response that the district judge continues to view the government's request for security clearances as an improper effort by the executive branch to intrude upon judicial prerogatives. Judge McMillan contends that the rules adopted by the Chief Justice of the United States pursuant to the classified Information Procedures Act which require security clearance for judicial employees in criminal cases have no precise analogue in civil litigation such as the instant FOIA case. Judge McMillan thus argues that his refusal to delay the FOIA case pending security clearance of his staff is not contrary to any specific statute, applicable rule or controlling authority, and thus cannot be a "clear

error" justifying mandamus. We musc disagree with the district judge's assessment.

By relying in part upon a Justice Department executive order to support its ial request for security clearances, the government's pleading may well have been ill advised and even tactless. At this juncture, however, there can be no serious suggestion that this matter involves nothing more than an attempt by the executive branch to restrict the judiciary. The central question properly before us is whether the national interest in preventting unauthorized disclosure of classified material demands reasonable deference from all branches of the govern- ment. We are persuaded that it does.

As we noted in our previous order, this Court's concern for potentially damaging

disclosure of sensitive and classified material in the course of the judicial process is well established. See Colby, supra. Moreover, the Supreme Court has consistently held that preserving the secrecy of information important to national security is a matter of compelling interest. See e.g., Snepp v. United States, 444 U.S. 507, 509 n. 3 (1980).

It is true that Congress has not, to date, specifically provided the same security measure in civil cases that it has mandated in criminal prosecutions. Unlike Judge McMillan, however, we perceive no diminished commitment to national security in Congress' present silence. Logically, the damage attendant to disclosure of classified material is unaffected by the legal context in which the disclosure occurs. We cannot conclude,therefore, that

Congress, by omission, has sanctioned an irrational distinction between disclosure in a civil case and a criminal prosection.

Although mandamus is traditionally viewed as the appropriate remedy only in instances of clear error, the writ may also be issued by the Court of Appeals when supervisory control of the district court is "necessary to the proper judicial administration of the federal system." United States Board of Parole v. Merhige, 487 F. 2d 25 (4th Cir. 1973), quoting LaBuy v. Howes Leather Co., 352 U.S. 244, 259-60 (1957). We are fully persuaded that such supervisory control is required here. Judge McMillan's refusal to obtain clearances for his staff presents the government with two equally unpalatable alternatives--face contempt sanctions for failure to disclose or by providing un-

authorized persons with access to classified material, take an action that cannot be remedied by a normal appeal. Requiring routine security clearance for Judge McMillan's staff avoids this dilemma in minimally intrusive fashion that also adequately guards the undisputed national interest. In reaching this conclusion, we are confident that the relevant clearance procedures will operate in an expeditious manner, thereby avoiding undue delay in the instant litigation.

Accordingly, it is ORDERED that the petition of the United States Justice Department for a writ of mandamus is granted. Pursuant to this order, District Judge James McMillan will not require the production of any classified material with regard to the pending civil litigation until those members of his staff who will

have access to those documents obtain security clearance.

ENTERED this 7th day of April, 1988, at the direction of Judge Hall with the concurrences of Judge Phillips and Judge Sprouse.

John M. Greacen
Clerk of the Court

FILED
Charlotte, N.C.
March 9, 1990
U.S. District Court
W. Dist. of N.C.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE
WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-86-336-M

BRUCE BOWERS, Plaintiff, -vs- UNITED STATES DEPARTMENT OF JUSTICE, Defendant.	)	O R D E R

Plaintiff seeks production under the Freedom of Information Act, 5 U.S.C. § 552, of the FBI files on three individuals--Kamenev, Znatnajs and Noreiko.

I have personally reviewed all three files. Twice.

It took a long time--three weeks or more. The files include many thousands of pages and occupy a good many cubic feet of space.

They are dull, principally because most of the reports include, in the nature of things, repetitious summaries and recitals

of items which had already been covered in previous reports.

I have taken the order of the Fourth Circuit Court of Appeals seriously and have received no assistance from anyone else in the review of the files and have made no notes as to the contents of the files, except a few cryptic items, now destroyed, which helped me find data that I wished to re-examine.

The court will not require release of the file of Kamenev. I do not think it contains any state secrets nor any information crucial to national security, and it contains no information which connects Kamenev with the subjects of either of the other two files. Release of this file is not being required because it is possible (theoretically) that, to one more technically expert than I, the file might con-

ceivably reveal a morsel or two of out-of-date information on technology.

As to the files on Noreiko and Znatnajs, they do not appear to contain anything remotely resembling anything connected with national security or other legitimate claim to exemption from the Freedom of Information Act. The subject Noreiko has been in this country for many years and has been apparently successfully employed in conventional occupations for most of that time, including recent times. She has held no position of trust or confidence in any government; she is not shown to have been in a position to handle or observe any confidential information. In short, the file shows nothing to indicate that she has ever been involved in matters involving national security nor any personal contacts with other people

involved in national security matters (except possibly for her attendance at a very large public gathering in this country where Kamenev and other public figures of this and other nations were present, but where she is not shown to have had any contact with Kamenev).

As to the subject Znatnajs, the file appears to be a complete blank as to anything remotely connected with national security or any other security interests of the United States. He is (or was) a person of low income and limited connections who came to this country many decades ago and, during the times addressed in the file, was living on a low economic level in New York City. The only thing "suspicious" about him (and this is repeated many times in subsequent reports) is, in substance, as I recall it, the following:

> That one United States agent had been told by an unidentified man in a bar that the subject had been seen in a New York bar buying drinks for uniformed American sailors and soldiers and asking them about their war experiences.

Numerous good men have spent thousands of hours writing thousands of pages of reports about the three persons whose files I have reviewed. The reports are careful, systematic, intelligent and, occasionally, interesting.

I do not disparage the work of our intelligence-gathering agencies; I do regret in the nature of things, so much of their effort (like so much of the effort of a judge) consists of stirring old bones and repeating previous reports. I am grateful to the members of the Federal Bureau of Investigation who so patiently and repeatedly provided me with the materials necessary to conduct this examination.

Nevertheless, after several weeks of work over a long period of time in reviewing and re-reviewing these files, I find no reason in national security or otherwise for the withholding of the information about Noreiko and Znatnajs from disclosure under the Freedom of Information Act.

IT IS THEREFORE ORDERED:

1. That the files of Noreiko and Znatnajs be made available to the plaintiff, as requested, on or before April 15, 1990.

2. That the United States Attorney confer with the plaintiff and work out with him for his inspection of the files.

3. That the motion to require production of the file on the subject Kamenev is DENIED.

This 7th day of March, 1990.

/s/ James B. McMillan

James B. McMillan

United States District Judge

JUGMENT IN A CIVIL CASE

UNITED STATES DISTRICT COURT	WESTERN DISTRICT OF NORTH CAROLINA
CASE TITLE	DOCKET NUMBER
BRUCE BOWERS V. UNITED STATES DEPARTMENT OF JUSTICE	C-C-86-0336-M
	Name of Judge or Magistrate
	JAMES B. MCMILLAN

____**Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

==========

____**Decision by Court.** This action came to trial or hearing before the Court with the judge (magistrate) named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Judgment is hereby entered pursuant to Final Order of the Court filed on the 9th day of March, 1990.

FILED

CHARLOTTE, N.C.

MAR 27 1990

CLERK THOMAS J. MCGRAW	Date 3-27-90
DEPUTY CLERK CINDY GIPSON	

[PUBLISHED]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 90-2603

BRUCE BOWERS,

Plaintiff-Appellee

versus

U.S. DEPARTMENT OF JUSTICE

Defendant-Appellant

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, Senior District Judge. (CA-88-336-C-C-M)

Argued: January 8, 1991 Decided: April 11, 1991

Before HALL and CHAPMAN, Circuit Judges, and COPENHAVER, United States District Judge for the Southern District of West Virginia, sitting by designation.

Reversed by published opinion. Judge Chapman wrote the opinion, in which Judge Hall and Judge Copenhaver joined.

ARGUED: John Peter Schnitker, Civil Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. James Hiram Lesar, Washington, D.C., for Appellee. **ON BRIEF:** Bernard Fensterwald, III, FENSTERWALD & ALCORN, P.C., Vienna, Virginia, for Appellee.

CHAPMAN: Circuit Judge:

This is an appeal by the Department of Justice from an order of the district

court directing the disclosure of the complete, unredacted FBI files on Ingrid Vanda Noreiko and Jacob Znatnajs. The order was the result of a suit by plaintiff Bruce Bowers under the Freedom of Information Act (FOIA), 5 U.S.C. § 52. Plaintiff is a journalist and is seeking the information in connection with news broadcasts and with a book he is writing. After an in camera review of the unredacted files and the written declarations submitted by the Department as to why the information was withheld, how it qualified for exemption from disclosure under 5 U.S.C. § 552 (b), and why it should not be released, the district court found that neither Noreiko nor Znatnajs had held a position of trust or confidence with any government, had not been shown to have handled or observed any confidential information, and

had not been involved in matters involving national security, and that there "was no reason in national security or otherwise for the withholding of the information about Noreiko and Znatnajs from disclosure under the Freedom of Information Act." We find that the district court erred in not applying the proper standards in its review of the records, in not giving any weight to the detailed explanations of the agency as to why the undisclosed information should be withheld, in not addressing and applying the exceptions found in 5 U.S.C. § 552(b), and in not finding facts to support its order releasing the files. The action of the district court is clearly erroneous, and we reverse.

I

In late 1984 and early 1985, plaintiff

Bruce Bowers sought disclosure from the FBI and the CIA of all documents relating to Vanentine Kamenev, Ingrid Noreiko and Jacob Znatnajs. Kamenev is a Soviet diplomat, who has served as a press attache in the Soviet Embassy in Washington, as Deputy Head of the press Department of the Soviet Ministry of Foreign Affairs in Moscow, and as Consul General in the Soviet Consulate in San Francisco. Znatnajs was a Russian subject, born in Latvia, who had illegally entered the United States in 1946 and had died in new York City in 1985. Noreiko immigrated to the United States in 1974 from the Soviet Union, and she has become an American citizen. Noreiko may be related to Znatnajs.

Bowers first requested information about Kamenev in December 1984 from the FBI. This request was denied. Thereafter

plaintiff submitted requests to the FBI for release of information concerning Znatnajs and Noreiko. Some information was released on Znatnajs and Noreiko, but other documents and information were withheld under exceptions to the Freedom of Information Act. After Bowers had exhausted his administrative remedies, he brought the present action and moved for an index as provided in Vaughn v. Rosen, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). Vaughn requires an agency in denying a request for documents under the Freedom of Information Act to furnish detailed justifications for exemption claims, itemize and index documents in such a manner as to correlate justifications for refusal to disclose where actual portions of documents are claimed to be exempt. Id. at 826-27. The

government answered and denied the plaintiff's claims. The district court directed the government to prepare Vaughn indices. An 80 page declaration from FBI special agent John Mencer was filed concerning the Noreiko and Znatnajs files and redacted copies of 42 documents from the Znatnajs file were released. A seven page declaration from special agent Robert Peterson concerning the Kamenev file was filed. As to Noreiko, the agent indicated that the investigation was still open and claimed that exemption (7)(A)[1] applied to the withholding of documents pertaining to Noreiko.

---

[1] 5 U.S.C. § 552(b) provides:

> This section does not apply to matters that are -- . . . . (7) records or information compiled for law enforcement purposes, but only to the extent that the production of such records or information (A) could reasonably be expected to interfere with enforcement proceedings . . . .

Over the course of the litigation, a number of redacted copies of documents have been delivered to the plaintiff. After the government's motion for summary judgment was denied, the district court directed that unredacted copies of all of the documents and the justification for the government's withholding be submitted to the court for in camera inspection. This resulted in the government submitting for the in camera inspection of the court unredacted copies of the three files, including copies marked to show the portions withheld from the plaintiff by the FBI and CIA pursuant to Freedom of Information Act exemptions (1), (2), (3), (6), (7)(C), 7()D), and (7)(E) and by the United States Marshal's Service pursuant to Freedom of Information exemption (7)(C). 5 U.S.C. § 552(b) (1), (2), (3), (6), (7)(C), (D),

and (E). Also submitted were in camera declarations of Phillip W. Thomas and Robert F. Peterson and public declarations of Robert F. Peterson explaining the reasons for withholding the entire Kamenev file. The court was also furnished public declarations of special agent John Mencer and Robert F. Peterson explaining the reasons for withholding the materials from the Znatnajs file, and an in camera declaration of Phillip W. Thomas and public declarations of Robert F. Peterson, John Frederick Mencer and Lee E. Carle explaining the reasons for withholding the materials from the Noreiko file. Thereafter, the government submitted the in camera declaration of Earl E. Pitts. These declarations exceeded 480 pages and explained in detail why § 552(b) exemptions applied to the information and documents withheld.

On March 7, 1990 the district court denied plaintiff's request for the production of the Kamenev file, but it directed that the complete FBI files[2] on Noreiko and Znatnajs be made available to the plaintiff on or before April 15, 1990. Following defendant's notice of appeal, we stayed the district court's order pending the outcome of this appeal.

We are no longer concerned with the Kamenev file because no appeal was taken from the district court's action in denying production of this file.

II

[2] The CIA documents were contained within the FBI files and therefore are not separately addressed in this opinion, because the exemptions from disclosure are sufficient to cover the information whether contained in the files of the FBI or CIA.

The appellant claims error by the district court in ordering disclosure of the information relating to Znatnajs and Noreiko because (1) the court failed to accord "substantial weight" to the expert opinions submitted by way of declarations of agents of the FBI and the CIA, the executive branch agencies charged with determining what information the government may properly release, and (2) the court summarily ordered disclosure of information after the FBI and the CIA had determined such information to be properly withheld from the plaintiff under FOIA exemptions (1), (2), (6), (7)(C), (7)(D) and (7)(E) and met their burden of demonstrating that the information was properly exempt from disclosure.

The standard of review in FOIA cases is limited to determining "'whether (1) the

district court had an adequate factual basis for the decision rendered and (2) whether upon this basis the decision reached is clearly erroneous.'" Spannaus v. Department of Justice, 813 F.2d 1285, 1288 (4th Cir. 1987)(quoting Willard v. Commissioner, 1776 F.2d 100, 104 (4th Cir. 1985)). Spannaus makes clear that the words "clearly erroneous" as used in that opinion do not refer to the standard of review provided by Rule 52(a) of the Federal Rules of Civil Procedure, and that any findings of fact made on a summary judgment motion are not entitled to the clearly erroneous protection on review. Of course, legal errors are reviewed de novo. Simmons v. Department of Justice, 796 F.2d 709, 710 (4th Cir. 1986).

III

The FOIA was enacted as a general disclosure statute pertaining to all federal records, but Congress "realized that legitimate governmental and private interests could be harmed by release of certain types of information." FBI v. Abramson, 456 U.S. 615, 621 (1982), and as a result Congress provided the exemptions set forth in § 552(b).

In general, the FOIA exemptions are to be narrowly construed in favor of disclosure. J. P. Stevens & Co. V. Perry, 710 F.2d 136, 139 (4th Cir. 1983). However, the act expressly recognizes that "public disclosure is not always in the public interest." Baldridge v. Shapiro, 455 U.S. 345, 352 (1982).

The government is claiming that the information contained in the files is exempt from disclosure under one or more of ex-

emptions (1), (2), (3), (6), (7)(C), (7)(D), and (7)(E) of § 552(b). Section 552(b) of the FOIA provides:

> This section does not apply to matters that are--
>
> (1)(A) specifically authorized under criteria established by an Executive order to be kept secret in the interest of the national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order;
>
> (2) related solely to the internal personnel rules and practices of the agency;
>
> (3) specifically exempted from disclosure by statute (other than Section 552b of this title), provided that such statute (A) requires that the matters be withheld from the public in such a

manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld;

. . . . .

(6) personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information . . ., (C) could reasonably be expected to constitute an unwarranted invasion of personal privacy, (D) could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency

or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by a confidential source, (E) would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law. . . .

Pursuant to § 552(B)(1)(A) and (B), a lengthy Executive Order No. 12,356 was is-

sued on April 6, 1982. This order prescribes a uniform system for classifying, declassifying and safeguarding national security information. This order

> recognizes that it is essential that the public be informed concerning the activities of its Government, but that the interests of the United States and its citizens require that certain information concerning the national defense and foreign relations be protected against unauthorized disclosure. Information may not be classified under this order unless its disclosure reasonably could be expected to cause damage to the national security.

Exec. Order No. 12,356, 47 Fed. Reg. 14, 874 (1982)

The district court did not address the specific exemptions claimed by the Department of Justice, and it did not discuss or acknowledge the voluminous and very detailed justifications for withholding certain information as filed by the Department and set forth in its 480 pages of in camera and public declarations of agents

Thomas, Pitts, Peterson, Mencer, and Carle. The district court's order does not mention the exemptions claimed nor the supporting declarations. The order is so concise and is couched in such general terms that we are left with the impression that the district court reviewed the material through the eyes of a layman and without consideration of the declarations of the agents, who are charged with reviewing FBI and CIA information for classification purposes. This impression is increased because of the district court's opinion that the records "do not appear to contain anything remotely resembling anything connected with national security or other legitimate claim to an exemption from the Freedom of Information Act." The court found that neither Noreiko nor Znatnajs had held a position of trust or con-

fidence with any government, and it was not shown that either had been in a position to handle or observe any confidential information. The court also found that most of the reports were "dull" and were repetitious summaries and recitals of items that had already been covered. The court concluded:

> Nevertheless, after several weeks of work over a long period of time in reviewing and re-reviewing these files, I find no reason in national security or otherwise for the withholding of the information about Noreiko and Znatnajs from disclosure under the Freedom of Information Act.

In connection with the Kamenev file, the court concluded:

> Release of this file is not being required because it is possible (theoretically) that, to one more technically expert than I, the file might conceivably reveal a morsel or two of out-of-date information or technology.

The presentation of the experts in the field of classifying and declassifying na-

tional security information was submitted to the court in the 480 pages of public and in camera declarations of the FBI and CIA agents, but the court does not discuss this evidence. Intelligence information may often be dull, repetitious and even tedious, but when it is considered with other bits and pieces of information, the total may present a picture that is detrimental to the national security of the United States. For this reason, the Congress, in enacting the exemptions in § 552 (b), and the President, in issuing Executive Order 12,356, have sought to protect certain information from disclosure under the FOIA. The declarations filed by the above agents are under penalty of perjury, and set forth the agents' opinions, with the reasons therefor, as to why various documents identified in the declarations

are exempt from disclosure under the FOIA. These declarations discuss the documents contained in the files of the FBI, the CIA and the Immigration and Naturalization Service on a page by page, line by line, and word by word basis and then provide the specific § 552(b) exemption under which nondisclosure is claimed and the reasons therefore. The agents making these declarations are highly trained in intelligence and national security matters, and they are designated by their agencies to review requests for documents and to prepare the declaration of exemptions from disclosure when necessary.

Phillip Thomas, who filed a declaration with the district court, is a special agent with the FBI and works in a supervisory capacity with the Classification Appeals and Affidavits Unit at FBI Headquar-

ters. He has responsibility for review of FBI information for classification purposes as mandated by Executive Order 12, 356 and for the preparation of affidavits and declarations in support of claims of exemption under § 552(b)(1) of the FOIA. 5 U.S.C. § 552(b)(1).

Robert Peterson, John F. Mencer and Earl E. Pitts are also special agents of the FBI assigned to the Classification Appeals and Affidavits Unit at FBI headquarters with the same responsibilities and duties as agent Thomas in reviewing FBI information for classification purposes under Executive Order 12,356. Each of them reviewed materials requested by the plaintiff in the present case and filed lengthy declarations with the district court in which they set forth the specific disclosure exemption claimed and

the reasons therefor for all of the documents withheld or the words deleted from documents.

Lee E. Carle is the information review officer of the Directorate of Operations (DO) of the United States Central Intelligence Agency. He has held operational executive positions with the Directorate of Operations since 1956 and is presently responsible for reviewing documents containing information originated by the DO or otherwise implicating DO interest, which may be requested pursuant to the FOIA. Agent Carle reviewed nine CIA-originated documents and claimed the exemptions therefore under § 552(b)(1), (2), (3), and (6). He stated his reasons for nondisclosure or deletion of various words in the documents. He found that the undisclosed information satisfied the substantial and

procedural classification requirements of Executive Order 12,356, that the information concerned intelligence activities of the CIA, and would reveal the identity of intelligence sources and/or disclose intelligence methods and could be expected to cause damage to the national security. This agent's declaration, as did the others, justified the deletion of each word in a redacted document, and the withholding of other documents, by reference to a particular exemption under § 552(b).

The purpose of the exemptions to full disclosure under the FOIA is explained by the Court in EPA v. Mink, 410 U.S. 73 (1973), as follows:

> Subsection (b) of the Act creates nine exemptions from compelled disclosure. These exemptions are explicitly made exclusive, 5 U.S.C. § 552(c), and are plainly intended to set up concrete, workable standards for determining whether particular material may be withheld or must be disclosed. Ag-

> grieved citizens are given a speedy remedy in district courts, where "the court shall determine the matter de novo and the burden is on the agency to sustain its action." 5 U.S.C. § 552(a)(3). Noncompliance with court orders may be punished by contempt. Ibid. Without question, the Act is broadly conceived. It seeks to permit access to official information long shielded unnecessarily from public view and attempts to create a judicially enforceable public right to secure such information from possibly unwilling official hands. Subsection (b) is part of this scheme and represents the congressional determination of the types of information that the Executive Branch must have the option to keep confidential, if it so chooses. As the Senate Committee explained, it was not "an easy task to balance the opposing interests, but it is not an impossible one either. . . . Success lies in providing a workable formula which encompasses, balances, and protects all interests, yet places emphasis on the fullest responsible disclosure." S. Rep. No. 813, p. 3.

Id. at 79-80.

In the present case the government claimed that under § 552(b)(1), (2), (3), (6), 7(C), and (D) certain information in the Znatnajs and Noreiko files was exempt,

because it included national security matters, the identities of informants, informant information and personal information about third parties who were not subject to the plaintiff's request. Each position taken was supported in the declarations of the aforementioned agents of the FBI and the CIA.

In its order, the district court does not mention the specific exemptions claimed by the Department of Justice. The order makes no reference to the declarations filed by the agents of the FBI and the CIA. The district court seemed satisfied that Noreiko had held no "position of trust or confidence with any government" and that "she is not shown to have been in a position to handle or observe any confidential information" nor had she "ever been involved in matters involving na-

tional security nor any personal contacts with other people involved in national security matters."

As to Znatnajs, the court found "[t]he file appears to be a complete blank as to anything remotely connected with national security or any other security interest of the United States." The only mention of § 552(b) exemptions appears in the general statement that the Noreiko and Znatnajs files "do not appear to contain anything remotely resembling anything connected with national security or other legitimate claim to exemption from the Freedom of Information Act."

It is obvious from the district court's order that it reviewed the files and the materials submitted by the Department of Justice to support its claim to exemptions under an improper standard. The court was

under a misapprehension that it was necessary for Noreiko and Znatnajs to be in a position of trust or confidence, or for them to have some information crucial to national security, or to be involved with national security, or to be involved with someone connected with national security. The law does not require that the subjects of a FOIA inquiry be involved with national security for the § 552(b) exemptions to apply. The inquiry of the district court must be directed at the information requested and the exemptions claimed. It is imperative that the court consider and accord "substantial weight to the expertise of the agencies charged with determining what information the government may properly release. "Simmons v. Department of Justice, 796 709, 711 (4th Cir. 1986).

Exemption (b)(1) exempts matters which

are "(A) specifical criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order." This exemption does not require, as a legal prerequisite for withholding, that the subject of plaintiff's request be "in a position to handled or observe confidential information." The massive information submitted by the Department of Justice in the agent's declarations describe in detail the content of the materials withheld or deleted and demonstrate the bases for withholding under § 552(b). Some of the information was withheld under Executive Order 12,356, other withheld information involved practices of the FBI and CIA, personnel files which would constitute a clearly unwarranted invasion of

personal privacy, disclosure of the identity of confidential sources, and intances specifically exempted from disclocloseure by another statute.[3] The plaintiff offered nothing to rebut the government's presentation.

What fact or bit of information may comprise national security is best left to the intelligence experts. If there is no reason to question the credibility of the experts and the plaintiff makes no showing in response to that of the government, a court should hesitate to substitute its judgment of the sensitivity of the information for that of the agency. As we stated in Spannaus, "[i]f the government

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[3] 50 U.S.C. 403g exempts the CIA from revealing various classifications of information and is precisely the type statute covered by exemption (b)(3). See Goland v. CIA, 607 F.2d 339 (D.C.Cir. 1978).

fairly describes the content of the material withheld and adequately states its ground for nondisclosure, and if these grounds are reasonable and consistent with the applicable law, a district court should uphold the government's position. The court is entitled to accept the credibility of the affidavits, so long as it has no reason to question the good faith of the agency." Spannaus v. Department of Justice, 813 F.2d 1285, 1289 (1987), quoting Barney v. Commissioner, 618 F.2d 1268, 1272 (8th Cir. 1980)).

In the present case the Department gave, in its more than 480 pages of declarations, a very detailed and particularized account of why the withheld information qualified under the exemptions of § 552 (b). This is substantially more than is required. As we stated in Spannaus:

> The Supreme Court has rejected the argument that the statute requires particularized showings of interference, holding instead that the Government may justify nondisclosure in a generic fashion. NLRB v. Robbins Tire & Rubber Co., 437 U.S. 214, 223-24, 236, 98 S.Ct. 2311, 2317-18, 2323, 57 L.Ed.2d 159 (1978).

Spannaus, 813 F.2d at 1288.

The unchallenged declarations presented by the Department of Justice to the district court demonstrate that disclosure of various parts of material would reveal information provided to the FBI by a foreign government, would identify the governmental entity in question which has expressly requested protection of its relationship with the FBI, would violate an understanding of confidentiality with the foreign government, would have a chilling effect on the free flow of information between the United States intelligence and law enforcement agencies and their foreign coun-

terparts. Under Executive Order 12,356, § 1.3(c): "Unauthorized disclosure of foreign government information, the identity of a confidential foreign source, or intelligence sources or methods presumed to cause damage to the national security."

The declarations also explained that disclosure would reveal specific intelligence activities conducted by the FBI, including an ongoing intelligence and counter intelligence activity, and would identify a technique utilized by foreign intelligence services known to the FBI and describe the level of investigative activity by the FBI. The declarations also showed that information at issue described an intelligence system and its capability and disclosure would reveal and compromise a technical and mechanical device or procedure used for the collection of intelli-

gence information, would allow a hostile entity to assess the general and specific intelligence capabilities of the Bureau during the time frame involved, would reveal information concerning confidential intelligence sources, including true names, code names and numerical designators. Much of the information provided to the FBI was done so with the express understanding that the identities of the informants would be given national security protection. The revealing of this information would compromise intelligence sources both present and future and would damage the national security of the United States.

The government's showing was made under oath and upon penalty of perjury by experienced agents of the FBI and the CIA trained in the fields of intelligence

counter intelligence and in the protection of intelligence information gathered. The government's showing clearly carried the burden placed upon it by § 552(a)(4)(B).

Applying the standard of review set forth in II above, we hold that the action of the district court in overruling the claims for exemption interposed by the government and in ordering the release of the unredacted files has no factual basis and is clearly erroneous. In reviewing the record, including the unredacted files and documents, and giving substantial weight to the detailed declarations of the FBI and CIA agents, and applying the clear language of the exemptions contained in § 552(b), we find that the withholding of the information by the defendant was legally and factually correct. Our review of the record also convinces us that a remand

of this matter for further findings of fact would serve no useful purpose and would only delay the conclusion of this litigation. The plaintiff has been furnished with a "reasonably segregable portion of the record . . . after deletion of the portions which are exempt under this subsection" as required by § 552(b), and this is all to which he is entitled on the present record.

REVERSED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Re: 90-2063 Bowers v. DOJ

(CA-86-336-C-C-M)

SEE INSTRUCTIONS BEFORE

COMPLETING THIS FORM

BILL OF COSTS

The Clerk is requested to tax the following costs against Appellee Bruce Bowers

COURT COSTS TAXABLE UNDER RULE 39, FRAP	CLAIMED*	TAXED
Docketing Fee	$	$
Printing Appendix		
1091 Pages	$ 872.80	$ 872.80
Printing Appellee's Brief		
Printing Appellant's Reply Brief 43 Pages	$ 64.50	$ 1031.80
TOTAL AMOUNT	$1031.80	$ 1031.80

If costs are sought for or against US,

agency or officer, cite statutory authority. 218 U.S.C § 2412(A), 1920.

I declare under penalty of perjury that the foregoing costs are true and correct and were necessarily incurred in this action. Service is made upon opposing counsel and a copy of the certificate of service is attached

Date	Signature	(For) Name of
4/18/91	/s/John Peter Schnitker	Claiming Party U.S. Department of Justice

CLERK'S CERTIFICATE OF COSTS

Costs are hereby taxed in the following amount $ 1031.80

Date	Clerk of	(By) Deputy
5/2/91	Court John M. Greacen	Clerk /s/ Scott A. Richie

*For the Clerk's convenience , we have attached an itemization of costs.

FILED: May 3, 1991

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 90-2063

Bruce Bowers

Plaintiff-Appellee

versus

U.S. Department of Justice

Defendant-Appellant

O R D E R

On April 19, 1991, appellant served a bill of costs in this case. On May 2, 1991, this Court awarded appellant $1,031.80 in costs. Appellee fled an untimely opposition to appellant's bill of costs on

May 3, 1991. Rule 39(d) of the Federal Rules of Appellate Procedure states that objections to bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless time is extended by the court. Appellee has not requested extension of time to file objection to bill of costs.

Treating appellee's opposition as a request for reconsideration of the award of costs on May 2, 1991, the Court denies the request for reconsideration.

For the Court--by Direction

JOHN M. GREACEN

_____

CLERK

Filed: June 3, 1991

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 90-2063

(CA-88-336-C-C-M)

Bruce Bowers,

Plaintiff-Appellee

versus

U.S. Department of Justice,

Defendant-Appellant

O R D E R

The Court amends its opinion filed April 11, 1991, as follows:

On page 16, second full paragraph, line 7--the word "and" is inserted between "government" and "would."

On page 16, second full paragraph, lines 10-11--the last sentence of the paragraph is amended and to begin: "Under

Executive Order 12,356, § 1.3(c) prohibits '[u]nauthorized disclosure of foreign government information . . . .'"

For the Court--By Direction

/s/ John M. Graecen

CLERK

SUPREME COURT OF THE UNITED STATES

No. A-6

Bruce Bowers,

Petitioner

v.

U.S. Department of Justice

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-mentioned case, be and the same is hereby, extended to and including August 9, 1991.

/s/ William H. Rehnquist

Chief Justice of the United States

Dated this 2nd day

of July, 1991